

## **AMENDMENTS**

Please amend the application as follows, without prejudice:

### **In the Drawings**

Kindly replace figures 1-5 with the Replacement Sheets submitted herewith.

## **REMARKS**

Claims 1-66 are pending in this application. Claim 9 has been amended to correct a typographical error, that is, applicant used the word “though” instead of the correct word which was “through.” The drawings and the specification were amended pursuant to the Examiner’s helpful suggestions. No new matter has been added by means of these amendments.

### **Objections to the Drawings**

In paragraph 1 of the Office Action, the Examiner objected to the drawings for failing to show the “collapsible ducts” and “cooling conduit” that are disclosed in the claims as filed. The replacement sheet for Fig. 1 shows the collapsible duct 40 attached to a top portion of canopy 34, as described in at least claim 7, as originally filed. Collapsible ducts 40 are also disclosed on page 13 beginning at line 3 of the specification. Specifically, at page 13, line 6, the specification discloses that “Collapsible Ducts 40 may be attached to Vent Fans 36 . . .”, which is what is shown on the replacement sheet for Fig. 1. And at page 13, line 3, the specification states “Collapsible Ducts 40, preferably attached to a top portion of Canopy 34”, which is what is shown on the replacement sheet for Fig. 2. Accordingly, no new matter is added by the replacement sheets for Fig. 1 and Fig. 2 since the replacement sheets are consistent with the original disclosure.

Applicant respectfully disagrees with the Examiner’s statement in paragraph 1 that the “cooling conduit” is not shown in the drawings. Perforated tubes 44 are an exemplary embodiment of the cooling conduit. Claim 57 states “the apparatus of Claim 46 wherein **the cooling conduit is a perforated tube** substantially within the chamber.” Figure 3 shows such an

embodiment. However, to address the Examiner's concern, Applicant has amended Fig. 4 to include Cooling Conduit 80, which is consistent with the specification and claims as originally filed and, accordingly, presents no new matter in this application.

In paragraph 3 of the Office Action, the Examiner objected to the drawings for failing to show perforated tubes 44 and perforations 50 in Figs. 3 and 4 as described in the specification. Replacement sheets for Figs. 3 and 4 are submitted herewith showing a perforation in perforated tube 44 in Fig. 3, and the proper graphical depiction of an embodiment of a perforation 50 in Fig. 4. The specification beginning at page 14 line 13 states that "Chiller 42 may be used to supply chilled air through Perforated Tubes 44 that run inside the Enclosure 10 along the Lower Perimeter 14 and/or Upper Perimeter 12." Fig. 3 as originally filed shows Perforated Tube 44. However, the perforation is not visible in the view. Likewise, Fig. 4 as originally filed points to Perforations 50, but the perforations are not visible in the view. Applicant submits replacement sheets to show what was clearly disclosed in the specification as filed; that is perforated tubes 44 and Perforations 50. Accordingly, no new matter has been added by these amendments

#### **Objection to the Specification**

In paragraph 4 of the Office Action, the Examiner objected to the specification as failing to provide proper antecedent basis for the feature "cooling conduit" as mentioned in claims 46, 56-57 and 64-65. Applicant has amended the specification consistent with the disclosure in such claims to further clarify that perforated tubes 44 are an exemplary embodiment of the cooling conduit for supplying chilled air to the chamber. *See e.g. Claim 57* ("the apparatus of Claim 46 wherein **the cooling conduit is a perforated tube** substantially within the chamber.") In addition to the support found in claim 57, further support for this amendment is

found at least at page 14, lines 13-15 of the specification, which states “Chiller 42 may be used to supply the chilled air through Perforated Tubes 44 that run inside the Enclosure 10 along the Lower Perimeter 14 and/or Upper Perimeter 12.” Applicant has also amended the specification by clarifying that the Cooling Conduit 80 has Perforations 50, as disclosed in claims 56-57 and 64-65. Accordingly, no new matter is added by these amendments.

### **Claim Objections**

In paragraph 5 of the Office Action, claim 9 was objected to as containing a typographical error. Applicant has amended claim 9 to correct this error.

### **Claim Rejections**

The Examiner has rejected claims 1, 5-7, 11, 16-18, 21-22, 24-26, 28-30, 32-35, 39 and 43-44 as being anticipated by U.S. Patent No. 6,450,188 to Langhart (“the ‘188 patent”). Applicant agrees with the Examiner’s statement on page 14, line 3 of the office action which states “with respect to claims 1, 20, 30 and 58, the Langhart reference fails to teach the use of a gasket,” and the statement on page 15, line 5 that “The Langhart reference fails to teach the use of a gasket.” Since all of the rejected claims under Section 102 are or depend from claims 1, 20 and 30, and claims 1 and 20 require “a gasket in communication with said lower perimeter, said gasket being deformable” and claim 30 requires “a gasket in communication with said lower perimeter, wherein said gasket is capable of being compressed by said lower perimeter against said surface to form a chamber,” the 102 rejection cannot be sustained. Accordingly, Applicant respectfully requests withdrawal of this rejection.

Alternatively, and although applicant respectfully disagrees with the Examiner’s reasons

for rejection of the claims in view of the '188 patent, applicant submits herewith a Declaration pursuant to 37 CFR § 1.131 to establish prior invention in the United States of the invention before December 29, 2000, the effective filing date of the '181 patent.

The Examiner also rejected claims 1, 2-4, 5-9, 10, 11, 15-26, 28-39, 43-55, 57-63, 65 and 66 as being unpatentable over the '188 patent to Langhart in view of one or more other references, in paragraphs 9-23 of the Office Action. Applicant respectfully disagrees with the overly broad reading of the '188 patent, the Examiner's statements regarding inherent teachings of the '188 patent, and that it would have been obvious for one of ordinary skill in the art to combine the '188 patent with the other cited references. Without providing any supporting rationale, the Examiner contends that it would have been obvious for one of skill in the art to combine the teachings of the '188 patent with, for example, teachings in the art of treating pipes. (See paragraph 14 of the Office Action). There is no motivation for combining such non-analogous art. However, in light of the accompanying § 1.131 Declaration, the Examiner's rejection of these claims is now moot.

**Declaration of Prior Invention in the United States (37 CFR § 1.131)**

The Declaration of Prior Invention ("Inventor's Declaration") and associated exhibits ("Ex.") establish beyond doubt that an embodiment of the invention of independent claim 1 (and similar elements recited in independent claims 20, 30, 46 and 58 of the pending application that the Examiner claims are disclosed by the '188 patent) was actually reduced to practice long before the December 29, 2000 effective filing date of the '188 patent. Accordingly, Applicant respectfully requests that such reference be removed from consideration and that the application be placed in condition for allowance.

Ex. C of the Inventor's Declaration shows photos of a prototype of an embodiment of the invention claimed in the instant application taken on June 13, 2000. The USDA viewed this technology at Royal Fumigation Inc.'s<sup>1</sup> Port of Wilmington facility in Delaware in August 2000 and approved Royal's use of this embodiment for commercial fumigation days after the viewing. In a letter dated August 22, 2000, the USDA stated "[t]he usage of the ArmaFlex tube for a sealant is **one that could revolutionize the fumigation industry.** . . . The usage of the "Foot seal" as a replacement for sand snakes for sealing a tarpullin is approved." (*Ex. E, page 2*). The letter refers to "three experiments conducted with this particular system" and that "[e]ach test held gas concentrations at acceptable levels." *Id.* Photographs taken during the inspection show the prototype viewed and the gasket on the lower perimeter of the fumigation tent, which the USDA referred to as a "Foot seal", as well as all of the features the Examiner claims are disclosed by the '188 patent. (*Ex. F*).

A USDA REPORT on this same visit (*Ex. G*), supplements: 1) the description shown in the photos of the visit (*Ex. F*), and 2) the description set forth in the August 22, 2000 letter (*Ex. E*), stating:

This foam-like material is fixed on a metal structure base. During fumigation, the structure is dropped down from the ceiling of the warehouse to cover the entire stack [of goods to be fumigated]. A tight seal is made from the weight of the structure due to the compression of the material and the cement floor.

One way to establish an actual reduction to practice is to show that the invention was sufficiently tested to demonstrate that it will work for its intended purpose, but it need not be in a commercially satisfactory stage of development. *See MPEP §2138.05*. Clearly, that requirement is

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<sup>1</sup> Royal Fumigation, Inc. ("Royal") is the owner by assignment of the present invention.

met and supported by the documentary evidence regarding USDA testing referred to in the August 22, 2000 USDA letter. (*Ex. E*).

Furthermore, the USDA's recognition of the utility of the invention (*Ex. E & G*) inures to the benefit of the inventors and strongly supports Applicant's claimed date of reduction to practice of the invention. "Inurement involves a claim by an inventor that, as a matter of law, the acts of another person should accrue to the benefit of the inventor." *Cooper v. Goldfarb*, 154 F.3d 1321, 1331 (Fed. Cir. 1998). Before a non-inventor's recognition of the utility of the invention can inure to the benefit of the inventor, the following three-prong test must be met: (1) the inventor must have conceived of the invention, (2) the inventor must have had an expectation that the embodiment tested would work for the intended purpose of the invention, and (3) the inventor must have submitted the embodiment for testing for the intended purpose of the invention. *Genentech Inc. v. Chiron Corp.*, 220 F.3d 1345, 1354 (Fed. Cir. 2000); *see also MPEP §2138.05*. All three elements of this test are clearly satisfied by the correspondence from the USDA.

Parenthetically, Applicant notes that diligence need not be shown at this time. Pursuant to 37 CFR § 1.131, the period for which diligence must be shown, referred to as the *critical period*, begins from the day before the effective reference date until the invention was reduced to practice. *See MPEP 715.07(a)*. Thus, the inventor need not show diligence before the critical period. Where, as here, the inventor has achieved an actual reduction to practice before the effective filing date of a reference, diligence need not be shown since an inventor is under no duty to file a patent application promptly. *See Townsend v. Smith*, 36 F.2d 292 (C.C.P.A. 1929).

#### Allowable Subject Matter

Applicant acknowledges with appreciation that the Examiner has deemed claims 12-14, 27, 40-42, 56 and 64 allowable as being dependent upon a rejected base claim. In light of the accompanying Inventor's Declaration, the Applicant respectfully submits that any amendments made at this time are unnecessary.



## CONCLUSION

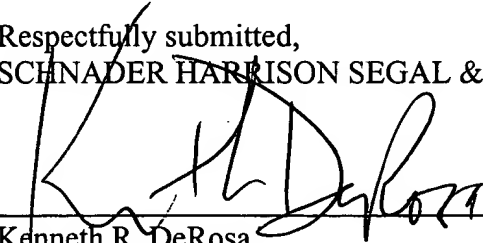
It is respectfully submitted that the claims in this application are all considered allowable over the relevant art of record and that the '188 patent should be removed as a prior art reference. Applicant respectfully requests an early notice of allowance.

The filing of the accompanying Inventor's Declaration is not an admission that the '188 patent alone or in combination with other cited references, would otherwise render the invention unpatentable.

If the Examiner believes that direct communication with the Applicants' attorney would advance the prosecution of this application, the Examiner is invited to telephone the undersigned at the number listed below.

Dated: 7/22/05 By: \_\_\_\_\_

Respectfully submitted,  
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